

Internal Revenue Service

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Department of the Treasury
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Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
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Date:
March 11, 2010

Company =

Business A =

State A =

State B =

Private Offering A =

Private Offering B =

Private Offering C =

Private Offering D =

Private Offering E =

Private Offering F =

Private Offering G =

Private Offering H =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Date 11 =

Date 12 =

Date 13 =

Date 14 =

Date 15 =

Tax Advisor =

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Dear :

We respond to your letter dated November 10, 2009, requesting rulings regarding § 382 of the Internal Revenue Code. The relevant information provided in that letter is summarized below.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed

by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

SUMMARY OF FACTS

Company was originally incorporated in State A on Date 1 and reincorporated in State B on Date 14. Company engages in Business A. As discussed in greater detail below, Company had multiple rounds of private stock offerings from inception through its initial public offering ("IPO") on Date 15.

At its inception, Company issued approximately a shares of common stock to its founders from Date 1 through Date 2. Taking into account stock splits on Date 5 and Date 8, respectively, the original amount of common stock shares issued through Date 2 increased to b shares as of Date 9. Approximately c additional common stock shares (adjusted for the Date 5 and Date 8 stock splits) were issued subsequently to the initial Date 2 issuance and prior to the Private Offering E transaction (discussed below) by reason of stock option exercises, common stock dividends, and general stock issuances.

Prior to its IPO, Company was a private corporation that engaged in numerous financing transactions to support the development of its products and the expansion of its customer base.

On Date 3, Company issued approximately d shares of Private Offering A at \$e per share. As these shares had substantially higher relative values than the then existing common stock and were issued to new investor/shareholders, Company determined that an ownership change within the meaning of § 382(g) occurred on the Private Offering A issuance date.

On Date 4, Company issued approximately f shares of Private Offering B at \$g per share. Company determined that an ownership change within the meaning of § 382(g) occurred on the Private Offering B issuance date.

On Date 6, Company issued approximately h shares of Private Offering C at \$i per share.

On Date 7, Company issued approximately j shares of Private Offering D at \$k per share.

On Date 10, Company issued approximately l shares of Private Offering E at \$m per share.

On Date 11, Company issued Private Offering F stock. In connection with the issuance of Private Offering F, shares of Company's Private Offering A, Private Offering B,

Private Offering C, and Private Offering D were converted into shares of Company's common stock. Additionally, the terms of Company's Private Offering E were modified in connection with the Private Offering F financing, which reduced the overall liquidation preferences of the Private Offering E stock.

Company issued Private Offering G and Private Offering H stock on Date 12 and Date 13, respectively.

On Date 15, Company completed its IPO of approximately n shares of common stock. In connection with Company's IPO, all of Company's outstanding preferred stock, the Private Offering E, Private Offering F, Private Offering G, and Private Offering H stock, were converted into approximately o shares of Company common stock.

Since Company was private during the Private Offering A through Private Offering H transactions, Company relied upon a third party advisor to perform valuations to determine the relative value of each class of stock for purposes of its § 382 analyses at the times of the Private Offering C, D, E, and F financings. Company engaged Tax Advisor to perform a § 382 ownership change analysis for the periods from inception through the Private Offering F financing (the "Section 382 Analysis"). Company's corporate records included the names of the various entities that had invested in each of the Private Offering A through Private Offering E financings (the "Participating Entities") as well as the amount of shares acquired by these entities in each financing.

In order to get a better understanding of the nature of the Participating Entities, Company identified representatives of the Participating Entities who were knowledgeable about a given Participating Entity's investment in Company stock (collectively, the "Investor Representatives"). Once identified, Company made written inquiries (the "Written Inquiries") of the Investor Representatives concerning:

- (i) Whether or the extent to which the Participating Entities were economic owners of Company's stock;
- (ii) The identity of potential indirect 5 percent shareholders of Company stock by reason of owning significant percentages of the economic rights in the Participating Entities;
- (iii) Any indirect shifting of Company stock among the owners of Company stock (e.g. segregation rules as applied to Participating Entities through redemptions, issuances of equity rights, etc.); and
- (iv) Whether the Participating Entities might be viewed as a single 5 percent shareholder under the "entity" rules of § 1.382-3(a) of the Income Tax Regulations.

After sending the Written Inquiries, Company arranged teleconferences between Tax Advisor, Company, and the Investor Representatives to discuss these questions for

purposes of the Section 382 Analysis (the “Participating Entity Interviews”). In certain cases, these discussions were supplemented by one or more emails confirming the understanding of the responses to the various questions submitted.

As a result of the information received in the Written Inquiries and the Participating Entity Interviews, Company confirmed that certain Participating Entities that invested in Company’s Private Offering D and/or Private Offering E stock either did not own shares of Company’s stock prior to these financing transactions or owned a disproportionately small amount of Company’s stock.

Among the less than 5 percent shareholders within the Participating Entities, it appears that approximately p Private Offering D shares and q Private Offering E shares were acquired by Participating Entities that did not own Company stock prior to the Private Offering D financing. Under the solely for cash exception of § 1.382-3(j), approximately r (s%) and t (more than u%) of the shares issued to these new investors would be treated as Exempted Shares (and treated as acquired by historic public groups) in the Private Offering D and Private Offering E financing transactions, respectively.

Company, with assistance from Tax Advisor, determined that if it allocated shares to newly created public groups based on knowledge about actual ownership of those shares rather than the amount of shares that would be allocated under the solely for cash exception of § 1.382-3(j), Company would have experienced an ownership change at the time of the Private Offering E financing (Date 10). If Company allocates the exempted shares amount under § 1.382-3(j) to the pre-existing public groups, an ownership change would occur at the time of the Private Offering F financing (Date 11).

The value of Company’s stock declined from the time of the Private Offering E financing to the Private Offering F financing and net operating losses arose between those two financing transactions, so Company would prefer to be able to allocate shares to newly created public groups based on knowledge about actual ownership of those shares.

REPRESENTATIONS

Company makes the following representations:

- (a) Company’s only classes of outstanding stock during the relevant testing periods are the Company common stock and the preferred stock described herein.
- (b) During the relevant testing periods, Company relied on its corporate records and information obtained from direct shareholder interviews to identify Company’s shareholders who have direct ownership interests of 5 percent or more of Company stock. Prior to the IPO, Company had no other actual knowledge or relevant tracking system of owners.

RULINGS

Based solely on information submitted and the representations set forth above, we rule as follows:

- (1) Company's corporate records and the information obtained from the Written Inquiries and Participating Entity Interviews are acceptable methods of determining "actual knowledge" under § 1.382-2T(k)(2).
- (2) Company is permitted to use actual knowledge to determine the allocation of shares issued in the financing transactions arising during the testing period ending as of the Private Offering E financing to newly segregated public group(s) and may make such an allocation in lieu of the allocations described in § 1.382-3(j).

CAVEATS

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed regarding whether Company experienced any ownership change as defined under § 382(g) as a result of any of the stock issuances described in this letter or whether Company correctly applied the acceptable methods for establishing actual knowledge of its stock ownership during the possible testing periods.

PROCEDURAL STATEMENTS

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

In accordance with the Power of Attorney on file with this office, we are sending a copy of this letter to your authorized representative.

Sincerely,

Filiz A. Serbes
Chief, Branch 3
Office of Associate Chief Counsel
(Corporate)

cc: